Supreme Court, U. S.
FILED
SEP 23 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-163

SERVICE PARTS, INC., et al.,
Petitioners,

vs.

SAF-GARD PRODUCTS, INC., WALTER C. AVREA and SAF-GARD SYTEMS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' MEMORANDUM IN OPPOSITION

WILLIAM H. DRUMMOND
DRUMMOND, NELSON & PTAK
516 E. Thomas Road
Phoenix, Arizona 85012
Counsel for the Respondents

LOUIS A. STAHL
STREICH, LANG, WEEKS, CARDON & FRENCH
100 West Washington
Phoenix, Arizona 85001
Of Counsel

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

INDEX

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-163

SERVICE PARTS, INC., et al.,
Petitioners,

vs.

SAF-GARD PRODUCTS, INC., WALTER C. AVREA
and SAF-GARD SYTEMS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' MEMORANDUM IN OPPOSITION

ARGUMENT

This is a run-of-the-mill patent case. It is hornbook law that the Court will not grant certiorari in cases, such as this one, where the District Court and the Court of Appeals have made concurrent findings that the patent in suit is valid and infringed, especially where the Petition seeks (e.g., pp. 2-5) to have this Court review complicated questions of fact.[1] *National Labor Relations Board* v. *Waterman S.S. Corp.*, 309 US 206; *United States* v.

---

1. Petitioners even urge (Pet. p. 5) this Court to determine whether the Court of Appeals erred in determining that the District Court

> "made an independent inquiry to determine if the patent was obvious. It considered no fewer than 89 prior art references and made extensive inquiries into the state of the art as it existed when Avrea applied for a patent." (A43-44).

Johnston, 288 US 220; *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 US 175.

The only issue raised by the Petition which involves any semblance of a question of law relates to the jurisdiction of the Court of Appeals under 28 U.S.C. §1292(a)(4), which provides, *inter alia*:

> The courts of appeals shall have jurisdiction of appeals from: . . . Judgments in civil actions for patent infringement which are final except for accounting.

The Court of Appeals affirmed the District Court's determination that the patent in suit was *valid* and *infringed* and noted (Pet. App. A46-47):

> Since no increased damages or attorneys fees have yet been assessed pursuant to the trial court's ruling that this is an exceptional case, we do not pass on the question of whether such awards would be proper under 35 U.S.C. §§284-285. Moreover, in view of our decision that the patent here in question is valid and infringed, and *consistently with our limited jurisdiction under §1292(a)(4), we do not review on this appeal the district court's holding pertaining to unfair competition,* for these matters may become moot by reason of the district court's determination as to damages for infringement in the accounting phase of this trial. [Emphasis supplied].

The Court of Appeals was eminently correct. The federal courts have no common law jurisdiction or powers; they derive all their powers from the Constitution and acts of Congress (*Rice* v. *Minnesota & N.W.R. Co.*, 1 Black 358) and the statute (28 U.S.C. §1292) conferring jurisdiction over "interlocutory" appeals is strictly construed (*Switzerland Cheese Association, Inc.* v. *E. Horne's Market, Inc.*, 385 US 23).

The purpose of the statute authorizing interlocutory appeals in patent cases was to enable the parties to take appeals from decisions relating to validity and/or infringement, without being compelled to first undertake expensive and protracted accounting proceedings. These accounting proceedings would have been rendered moot if the patent had been held invalid and/or not infringed on appeal. *McCullough* v. *Kammerer Corporation*, 331 US 96. That purpose has been fulfilled in this case.

The Court of Appeals has decided that the patent in suit is valid and infringed. This inherently means that there *will* be an accounting proceeding and no further determinations by the Court of Appeals respecting the "willfulness" of the infringement or associated "unfair competition" can add or detract from Respondents' right to proceed with the accounting. These subsidiary issues go to the *amount* of the damages and are properly reviewable by the Court of Appeals only after *final* judgment of the District Court determining the damages.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM H. DRUMMOND
DRUMMOND, NELSON & PTAK
Counsel for the Respondents

LOUIS A. STAHL
STREICH, LANG, WEEKS, CARDON
& FRENCH
Of Counsel